Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH E. SPANIOL, JR.
CLERK

(9)

No. 89-5867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERANS ADMINISTRATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER

GREGORY O'DUDEN *
Director of Litigation

ELAINE KAPLAN
Deputy Director of Litigation

KERRY L. ADAMS
Assistant Director of Litigation

NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 785-4411

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATUTORY BACKGROUND	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 153 N.E. 28 (1926) 17
Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 8, 9, 14
Bell v. Veterans Administration Hospital, 826 F.2d 357 (5th Cir. 1987) 15
Block v. Neal, 460 U.S. 289 (1983) 17
Bornholdt v. Brady, 869 F.2d 57 (2d Cir. 1989) 3
Brown v. General Services Administration, 425 U.S. 820 (1976) 13
Brown v. J.I. Case Co., 756 F.2d 48 (7th Cir. 1985) 9
Chandler v. Roudebush, 425 U.S. 840 (1976) ..... *passim*
Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) 8
Espinoza v. Missouri Pac. R.R., 754 F.2d 1247 (5th Cir. 1985) 9
Fox v. Eaton Corp., 615 F.2d 716 (6th Cir. 1980) 9
Franchise Tax Board v. United States, 467 U.S. 512 (1984) 16
Harris v. U.S. Department of Transportation, 843 F.2d 219 (5th Cir. 1988) 15
Indian Towing Co. v. United States, 350 U.S. 61 (1955) 17
King v. Dole, 782 F.2d 274 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 856 (1986) 11
Lavery v. Marsh, 727 F. Supp. 728 (D. Mass. 1989) 3
Lee v. United States Postal Service, 774 F.2d 1067 (11th Cir. 1985) 11
Lehman v. Nakshian, 453 U.S. 156 (1981) 16
Love v. Pullman, 404 U.S. 522 (1972) 14
Lubniewski v. Lehman, 891 F.2d 216 (9th Cir. 1989) 3
Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984) 10, 14
Milam v. United States Postal Service, 674 F.2d 860 (11th Cir. 1982) 10
Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985) 14

TABLE OF AUTHORITIES—Continued

Page

Mohasco v. Silver, 447 U.S. 807 (1980) 8, 9
Mondy v. Secretary of the Army, 845 F.2d 1051 (D.C. Cir. 1988) 10, 12, 15
Morton v. Mancari, 417 U.S. 535 (1974) 10
Paulk v. Department of the Air Force, 830 F.2d 79 (7th Cir. 1987) 14
Rice v. Hamilton Air Force Base Commissary, 720 F.2d 1082 (9th Cir. 1983) 10
Rice v. New England College, 676 F.2d 9 (1st Cir. 1982) 9
Schiavone v. Fortune, 477 U.S. 21 (1986) 15
Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984) 10
Soriano v. United States, 352 U.S. 270 (1957) 11
United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949) 17
United States v. Kubrick, 444 U.S. 111 (1979) 11, 17
United States v. Mitchell, 463 U.S. 206 (1983) 17
United States v. Mottaz, 476 U.S. 834 (1986) 11
United States v. Yellow Cab Co., 340 U.S. 543 (1951) 17
Valenzuela v. Kraft, Inc., 801 F.2d 1170 (9th Cir. 1986) 9
Williams v. Department of the Navy, 715 F.2d 1485 (Fed. Cir. 1983) 5
Williams v. Army & Air Force Exchange Service, 830 F.2d 27 (3d Cir. 1987) 15
Zipes v. Trans World Airlines, 455 U.S. 385 (1982) 9, 10, 12, 14

STATUTES AND REGULATIONS:

Civil Rights Act of 1964, Title VII, Section 717, Pub. L. No. 88-352, 78 Stat. 241 ..... *passim*
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 ..... 3, 5, 11
Equal Employment Opportunity Act of 1972, Section 11, Pub. L. No. 92-261, 86 Stat. 103 ..... 3, 12, 16
Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2955 3

TABLE OF AUTHORITIES—Continued

	Page
Civil Service Reform Act of 1978	
5 U.S.C. § 7121(d)	6
5 U.S.C. § 7702	5, 6
5 U.S.C. § 7702(a)(1)	5
5 U.S.C. § 7702(a)(3)(B)	6
5 U.S.C. § 7702(b)(1)	6
5 U.S.C. § 7702(b)(2)	6
5 U.S.C. § 7702(b)(3)	6
5 U.S.C. § 7702(b)(5)(A)	6
5 U.S.C. § 7702(c)	6
5 U.S.C. § 7702(d)(1)	6
5 U.S.C. § 7702(d)(2)(A)	6
5 U.S.C. § 7702(e)(1)(B)	5
5 U.S.C. § 7702(e)(1)(C)	6
5 U.S.C. § 7703(b)(1)	5, 6
5 U.S.C. § 7703(b)(2)	5, 6, 11
28 U.S.C. § 2401(b)	11
28 U.S.C. § 2409a(f)	11
29 U.S.C. § 794a(a)(1)	3
Civil Rights Act of 1964	
Section 706	12
Section 717(a)	3
Section 717(c)	5, 12
42 U.S.C. § 2000e-5	4, 11, 12
42 U.S.C. § 2000e-5(e)	12
42 U.S.C. § 2000e-5(f)	12
42 U.S.C. § 2000e-5(f)(1)	8, 11, 16
42 U.S.C. § 2000e-5(f)-(k)	11
42 U.S.C. § 2000e-16	3, 11
42 U.S.C. § 2000e-16(a)	3
42 U.S.C. § 2000e-16(b)	4
42 U.S.C. § 2000e-16(c)	*passim*
42 U.S.C. § 2000e-16(d)	11, 12
5 C.F.R. § 1201.154(b)	6
29 C.F.R. § 1613.214(a)(1)(i)	4
29 C.F.R. § 1613.214(a)(1)(ii)	4
29 C.F.R. § 1613.214(a)(4)	4
29 C.F.R. § 1613.215(a)(4)	4
29 C.F.R. § 1613.233(a)	4

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. § 1613.233(b)	7
29 C.F.R. § 1613.233(c)	4, 7
29 C.F.R. § 1613.281(a)	4
29 C.F.R. § 1613.281(b)	4
29 C.F.R. § 1613.281(c)	5
29 C.F.R. § 1613.281(d)	5
Fed. R. Civ. P. 15(c)	15
MISCELLANEOUS:	
JOINT EXPLANATORY STATEMENT OF THE COMMITTEE ON CONFERENCE OF THE CIVIL SERVICE REFORM ACT OF 1978, H.R. CONF. REP. No. 1717, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2860, 2875	3
H.R. Rep. No. 238, 92d Cong., 1st Sess. 22-23 (1971)	13, 17
S. Rep. No. 415, 92d Cong., 2d Sess. 16 (1971)	10, 12, 13, 17
Statement of Senator Williams *reprinted in* SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. (Comm. Print 1972)	13
Statement of Senator Cranston *reprinted in* SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. (Comm. Print 1972)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5867

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERANS ADMINISTRATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE [1]

Amicus curiae, the National Treasury Employees Union ("NTEU"), is a federal-sector labor union that is the exclusive bargaining representative of approximately 140,000 federal employees nationwide. NTEU represents the interests of its bargaining units, by, among other things, negotiating collective bargaining agreements, arbitrating grievances, and seeking to vindicate the individual and collective rights of federal employees before administrative and judicial tribunals. NTEU and

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, all parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk.

the employees it represents have a vital interest in the resolution of the question here, regarding whether the 30-day time period for bringing suit against the federal government under Title VII of the Civil Rights Act of 1964, as amended, is subject to equitable tolling and waiver.

The lower court has ruled that the time limit is jurisdictional and may never be modified on equitable grounds. Based on its knowledge of the realities of the EEO process in the public sector, NTEU believes that this ruling would impose serious obstacles to fulfillment of Congress' commitment to eradicate entrenched discrimination in the federal workplace. The lower court's holding frustrates this congressional goal because, as in the private sector, many federal employee complainants pursue their claims without any representation at all, or at best, with the advice of non-lawyer union representatives. Complainants' rights are further at risk because the federal EEO process is especially complex, and the time period for bringing suit once administrative remedies have been exhausted is quite short. Because of its commitment to promoting a federal workplace free of unlawful discrimination, and its interest in protecting the civil rights of its members, NTEU is filing this brief in support of petitioner.[2]

---

[2] As amicus curiae, we address in detail only the first question presented in the petition for a writ of certiorari, *i.e.*, the critical legal issue concerning whether the 30-day time limit for filing civil suits is jurisdictional or is subject to waiver and tolling. This case also raises the subsidiary question of whether the 30-day period begins to run when the claimant or his attorney receives actual notice of final agency action, or, as the lower court held, when the notice is received by the attorney's office. Even if the filing period commences when notice is received in an attorney's office, equitable principles require that tolling be available to ensure that the notice is reasonable and that the complainant is given a fair opportunity to meet the 30-day deadline. This fact-bound question is best left to the trial court.

STATUTORY BACKGROUND

Congress extended the protections of Title VII of the Civil Rights Act of 1964, as amended, to federal employees in § 11 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. As amended, section 717(a) of Title VII, 42 U.S.C. § 2000e-16(a), prohibits federal agencies from discriminating against employees on the basis of race, color, religion, sex, or national origin. Title VII's "remedies, procedures and rights" (contained in 42 U.S.C. § 2000e-16) were made applicable to federal employees' claims of handicap discrimination, by the 1978 amendments to the Rehabilitation Act. 29 U.S.C. § 794a(a)(1). Petitioner's claim of handicap discrimination, therefore, is subject to the same 30-day filing period and other procedures as discrimination claims brought under Title VII (42 U.S.C. § 2000e-16(c)).[3]

Under Title VII, federal employees, like employees in the private sector, are guaranteed the right to a trial *de novo* in a federal district court, once informal conciliation efforts have failed. *Chandler v. Roudebush*, 425 U.S. 840 (1976). In the federal sector, however, there is a bewildering array of alternative administrative routes federal employees may follow before they may file a Title VII civil action in district court. Congress treated discrimination in the federal workplace so seriously that it gave employees several alternative methods for seeking redress before finally reaching federal court. The Joint Explanatory Statement of the Committee on Conference of the Civil Service Reform Act of 1978 lists "eight different times when the employee may have the right to bring suit in Federal district court." H.R. CONF. REP.

---

[3] Whether Title VII's 30-day time period applies to petitioner's claim of age discrimination is in doubt. *Compare Bornholdt v. Brady*, 869 F.2d 57, 64-68 (2d Cir. 1989) and *Lubniewski v. Lehman*, 891 F.2d 216, 218-19 (9th Cir. 1989) *with Lavery v. Marsh*, 727 F. Supp. 728 (D. Mass. 1989).

No. 1717, 95th Cong., 2d Sess. 141, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2860, 2875. Each of these paths has its own pitfalls, against which the administrative agencies have tried to protect employees by routinely making filing dates subject to equitable tolling.

The various paths appear within two basic administrative routes a federal discrimination complainant may follow on the way to district court. The ruling here, regarding construction of the judicial filing period, will directly control all future access to the courts under the first route. It may also affect judicial access at various junctures under the alternative route.

1. The federal complainant's first option, used by petitioner here, is to follow administrative procedures prescribed by the Equal Employment Opportunity Commission ("EEOC") pursuant to 42 U.S.C. § 2000e-16(b). This course begins with informal counselling and a formal complaint and culminates in a final written decision by the agency head. There are time limits at each step in the process, including time limits for contacting an EEO counsellor and filing an administrative complaint, but these periods are subject to equitable tolling. *See* 29 C.F.R. §§ 1613.214(a)(1)(i), (a)(1)(ii), (a)(4); 1613.215(a)(4).

After obtaining a final agency determination, the employee has two choices. He "may file a civil action as provided in section 2000e-5 of [Title 42]" (the private sector analogue of section 717) within 30 days of receipt of the agency's final decision. 42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. § 1613.281(a).[4] Alternatively, an employee may file a notice of appeal with the EEOC, within 20 days of receipt of the agency's decision, a filing period that is subject to tolling. 29 C.F.R. § 1613.233(a), (c).

[4] The employee may file a civil action without waiting for a final agency decision if none has been issued after 180 days from the date the complaint was filed. 29 C.F.R. § 1613.281(b).

The employee then has the right to file a civil action under 42 U.S.C. § 2000e-16(c) within 30 days of receipt of the EEOC's decision—which is the provision at issue in this case—or after 180 days from the filing of the notice of appeal, if there has been no decision. 29 C.F.R. § 1613.281(c), (d).

2. In addition to these avenues of redress specifically provided by section 717(c) of Title VII, the Civil Service Reform Act of 1978, Pub. L. No. 95-454 ("CSRA"), provides its own complex assortment of procedures for federal employees suffering unlawful discrimination.

If the discrimination is the basis for an adverse personnel action that is otherwise directly appealable to the Merit Systems Protection Board ("MSPB" or "Board") (generally serious discipline or performance based actions), the employee may pursue his Title VII claims before the Board. 5 U.S.C. § 7702. After the MSPB decides the case, the employee has three options.[5] First, the employee can file an appeal directly in the Court of Appeals for the Federal Circuit under 5 U.S.C. § 7703(b)(1), "within thirty days after the date the petitioner received notice" of the final Board order, but only if he waives all discrimination components of his claim.[6] Second, if he wishes to preserve his Title VII claim, the employee can file an action in district court under section 717(c) of the Civil Rights Act of 1964. 5 U.S.C. § 7703(b)(2). The Civil Service Reform Act provides, however, that "[n]otwithstanding any other

[5] If the Board does not act within 120 days (5 U.S.C. § 7702(a)(1)), the employee "shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964." 5 U.S.C. § 7702(e)(1)(B).

[6] The Federal Circuit has held that it does not have appellate jurisdiction over adverse personnel actions in "mixed" cases—that is, cases where a discrimination claim is part of the employee's challenge. *Williams v. Department of the Navy*, 715 F.2d 1485, 1488 (Fed. Cir. 1983). The employee must waive the discrimination claims before the court of appeals will assume jurisdiction.

provision of law, any such case . . . must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under section 7702." *Id.* Alternatively, "within 30 days after notice" of the MSPB's decision, an employee can petition the EEOC to consider it, 5 U.S.C. § 7702(b)(1), setting in motion an extremely complicated scheme of review.

Under this scheme, the EEOC must decide within 30 days whether to consider the MSPB's decision; if it does not, that decision becomes "judicially reviewable" as of the date the EEOC declines consideration. 5 U.S.C. § 7702(b)(2), (a)(3)(B). If the EEOC decides to consider the MSPB decision, it must, within 60 days, either concur in the Board's decision or issue a decision of its own. 5 U.S.C. § 7702(b)(3). If it concurs, "the decision of the Board shall be a judicially reviewable action." 5 U.S.C. § 7702(b)(5)(A). If the EEOC issues its own decision, the MSPB must consider the EEOC decision within 30 days. 5 U.S.C. § 7702(c). If the Board concurs, its decision becomes judicially reviewable, but if the Board disagrees, the entire matter must be certified to a Special Panel. 5 U.S.C. § 7702(c), (d)(1). The Panel issues a "judicially reviewable" decision within 45 days. 5 U.S.C. § 7702(d)(2)(A). At any time after 180 days from the time the employee first petitioned the EEOC for review, the employee "is entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964." 5 U.S.C. § 7702(e)(1)(C).

Finally, employees who are covered by a collective bargaining agreement may elect to pursue yet another avenue of review—grievance arbitration. 5 U.S.C. § 7121(d). An employee who elects grievance arbitration may file a petition for review with the MSPB "within 20 days after receipt of the final decision," if the discrimination occurred in connection with a personnel action over which the Board has jurisdiction. 5 C.F.R. § 1201.154(b). Alternatively, under EEOC regulations, an employee who elects contractual remedies may file a notice of appeal to the EEOC up to 20 days after 1) receipt of a final agency decision on the grievance and the expiration of the time during which arbitration may be invoked; 2) receipt of the arbitrator's award; or 3) receipt of a decision of the Federal Labor Relations Authority on exceptions to the arbitrator's award. 29 C.F.R. § 1613.233(b). This 20-day deadline is subject to tolling. 29 C.F.R. § 1613.233(c). When an employee has pursued a negotiated procedure and sought review by the EEOC or MSPB, he has the right to file a civil action, under the same conditions described above, relating to court access after an EEOC or MSPB decision.[7]

SUMMARY OF ARGUMENT

The time limit for filing a Title VII suit in the public sector uses the same operative language and precisely parallels the private-sector's time limit. This Court has already determined that the deadline for private workers is not jurisdictional but rather is in the nature of a statute of limitations, and thus subject to waiver and equitable tolling.

The language, statutory structure and policy behind the federal provision all establish that Congress intended the public-sector time limit to be interpreted in the same manner as its private counterpart. Congress used virtually identical permissive language and created a parallel structure, keeping the time limit separate from the courts' jurisdictional provision, and it even incorporated applicable private-sector filing provisions. The legisla-

---

[7] An employee also appears to have the right to file a civil action after he has exhausted the negotiated procedure without resort to either EEOC or MSPB directly under 42 U.S.C. § 2000e-16(c), since the final decision on his grievance might be considered the agency's "final action" within the meaning of that section.

tive history is unusually clear in establishing congressional intent to place federal workers on a par with other employees and to afford them equal Title VII rights, including the same access to the courts.

Departing from the construction adopted in the private sector would severely undermine Congress' intent to eradicate discrimination in the federal workplace by imposing a substantial obstacle in the path to the district court. Such a result is particularly burdensome where, as here, it is common for employees to tread a tortuous administrative path and reach the point of judicial filing without having secured legal counsel.

Principles of sovereign immunity fail to justify a statutory interpretation that has already been rejected as too restrictive and contrary to congressional intent in the private sector. There is every indication that Congress intended to place federal workers on the same footing as private sector workers, who do not face a jurisdictional filing deadline. The courts are not free to narrow the broad waiver of sovereign immunity that Congress demonstrably provided.

ARGUMENT

This Court's decisions establish that the Title VII time limit governing the filing of civil suits in the private sector (42 U.S.C. § 2000e-5(f)(1)) is not jurisdictional but is subject to waiver, estoppel, and equitable tolling. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151-52 & n.6 (1984); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-54 (1983); *Mohasco v. Silver*, 447 U.S. 807, 811 (1980).

In *Crown, Cork & Seal*, the Court ruled that the 90-day filing period was in the nature of a statute of limitations and thus subject to equitable tolling. Specifically, the period for filing an individual district court action was tolled while a class action, in which the employee

was a putative class member, was pending before the courts. 466 U.S. at 352-54. In *Baldwin County Welcome Center*, the Court assumed without debate that the same 90-day filing period was subject to waiver or tolling, in ruling that no facts justified equitable relief in that particular case. 466 U.S. at 151-52 & n.6. Finally, the Court noted in *Mohasco* that defendant had waived any objection to the suit having been filed on the 91st day, a waiver that would have been of no effect if the defect had been jurisdictional in nature. *See* 447 U.S. at 811 n.9.

Similarly, the Court has held that the period for filing an administrative charge with the EEOC is not a jurisdictional prerequisite for filing a civil suit, but is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).[8] Such a holding "honor[ed] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes*, 455 U.S. at 398.

The same results should obtain in the federal sector. This Court has already recognized the general applicability of private-sector Title VII principles to the federal sector, in *Chandler v. Roudebush*. In that case, federal employees were granted the same right to trial *de novo* as is enjoyed by private sector employees under Title VII. The Court observed that "[a] principal goal" of extending Title VII to the federal employer "was to

---

[8] The courts of appeals have unanimously concluded that *Crown, Cork & Seal, Baldwin County Welcome Center, Mohasco* and *Zipes* establish a general rule that the time period for filing civil actions against private employers is not jurisdictional but is in the nature of a statute of limitations subject to tolling and waiver. *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986); *Brown v. J.I. Case Co.*, 756 F.2d 48, 49-50 (7th Cir. 1985); *Espinoza v. Mo. Pac. R.R.*, 754 F.2d 1247, 1250-51 (5th Cir. 1985); *Rice v. New England College*, 676 F.2d 9, 10 (1st Cir. 1982); *Fox v. Eaton Corp.*, 615 F.2d 716, 718 (6th Cir. 1980).

eradicate 'entrenched discrimination in the Federal service' . . . by strengthening internal safeguards and by according '[a]ggrieved [federal] employees or applicants . . . *the full rights available in the courts as are granted to individuals in the private sector under title VII.*'" *Chandler v. Roudebush*, 425 U.S. at 841, *quoting Morton v. Mancari*, 417 U.S. 535, 547 (1974) and S. Rep. No. 415, 92d Cong., 2d Sess. 16 (1971) (emphasis supplied). The principles of waiver and equitable tolling are another important component of the "rights available in the courts" to private-sector employees. Congress intended that they also be available to federal employees, just as the right to trial *de novo*.

Divining congressional intent on this issue requires consideration of the language of the filing requirement, statutory structure and the policy behind the enactment. *See Zipes*, 455 U.S. at 393. Each of these elements supports the conclusion that the 30-day filing period for federal employees, just as its private-sector analogue, is not jurisdictional.[9]

1. First, the language of section 2000e-16(c) which sets forth the 30-day requirement is not mandatory in tone, nor does it speak in jurisdictional terms. It does not, for example, state that any civil action "must" be filed within 30 days, or that all claims "shall be barred" if not filed within 30 days. Rather, section 2000e-16(c) states that within 30 days an employee "may file a civil

[9] Three courts of appeals have concluded that section 2000e-16(c) is not jurisdictional. *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1054-57 (D.C. Cir. 1988); *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Milam v. United States Postal Service*, 674 F.2d 860, 862 (11th Cir. 1982). In addition to the Fifth Circuit, the Ninth Circuit has also held the provision to be jurisdictional, although that Court has not reexamined the issue in light of *Zipes*. *See Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1083-84 & n.1 (9th Cir. 1983). The Seventh Circuit has held that the time period for filing administrative charges in the federal sector is jurisdictional. *Sims v. Heckler*, 725 F.2d 1143, 1145-46 (7th Cir. 1984).

action." This language uses the same operative word "may" as the non-jurisdictional language in section 2000e-5(f)(1), which provides that within 90 days "a civil action may be brought."[10]

The language of 42 U.S.C. § 2000e-16, moreover, incorporates the filing provisions of the private sector, clearly establishing symmetry between the rights of federal employees to file civil actions and the rights afforded private-sector employees. Subsection (c) states that within 30 days of receipt of notice of final action an employee "may file a civil action *as provided in section 2000e-5 of this title*" (emphasis supplied). Similarly, subsection (d) of section 2000e-16 states that "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."

Section 2000e-16 thus explicitly references and incorporates its private sector counterpart, section 2000e-5

[10] The permissive language of section 2000e-16(c) is thus materially different from the language used in other limitations statutes this Court has construed where suits have been brought against the government. *E.g., United States v. Mottaz*, 476 U.S. 834 (1986) (28 U.S.C. § 2409a(f)—a civil action "shall be barred unless" commenced within twelve years); *United States v. Kubrick*, 444 U.S. 111 (1979) (28 U.S.C. § 2401(b)—"a tort claim against the United States shall be forever barred unless" it is timely presented to the agency); *Soriano v. United States*, 352 U.S. 270 (1957) (28 U.S.C. § 2401(b)—"every claim . . . shall be barred" unless filed within six years).

The language of section 2000e-16(c) also contrasts with the language of the CSRA, which governs actions in district court after a decision by the MSPB on a discrimination claim arising out of an individual personnel action within the Board's jurisdiction. *See King v. Dole*, 782 F.2d 274, 276 (D.C. Cir. 1986) (holding that 30-day time limit of 5 U.S.C. § 7703(b)(2) *is* jurisdictional because "clear and emphatic" language states that "[n]otwithstanding any other provision of law, any such case filed . . . must be filed within 30 days"), *cert. denied*, 479 U.S. 856 (1986); *but see Lee v. United States Postal Service*, 774 F.2d 1067, 1068 (11th Cir. 1985) (assuming without deciding that time limit in 5 U.S.C. § 7703(b)(2) is not jurisdictional by analogy to 42 U.S.C. § 2000e-16(c)).

(f)(1), which this Court has treated as non-jurisdictional. This Court reasoned in *Chandler v. Roudebush* that Congress incorporated the private-sector provisions because it intended for such provisions to govern in the public sector. "Since federal-sector employees are entitled by § 717(c) to 'file a civil action as provided in section 706 [42 U.S.C. § 2000e-5 . . .]' and since the civil action provided in § 706 is a trial *de novo*, it would seem to follow syllogistically that federal employees are entitled to a trial *de novo* of their employment discrimination claims." 425 U.S. 845-46. The same syllogism exists here. The adoption of private-sector filing procedures entitles federal employees to the equitable relief provided to other workers.

Finally, as in *Zipes*, the time-limit does not appear in the statutory provision governing the jurisdiction of the courts. *See* 455 U.S. at 394-95. In the private-sector provisions, the fact that the 90-day filing period (section 2000e-5(e)) was separate from the jurisdictional provision (section 2000e-5(f)) helped to establish the non-jurisdictional nature of the time limit. Again, the structure here is directly parallel. The 30-day time limit contained in section 2000e-16(c) is separate from section 2000e-16(d), the provision that defines the jurisdiction of the courts by cross-reference to section 2000e-5(f). *Accord Mondy v. Secretary of the Army*, 845 F.2d at 1056.

2. In addition to the statutory language and structure, the legislative history and policies of the Equal Employment Opportunity Act of 1972 also signal Congress' intention that the 30-day limit be interpreted in the same manner as the private-sector filing limit. Congress declared its intent to afford federal employees "the full rights available in the courts as are granted to individuals in the private sector under Title VII." S. Rep. No. 92-415, at 16. Congress was strongly committed to correcting the demonstrated history of discrimination in

federal employment, *id.*, and it perceived that full access to district court was a key means to that end.

The House Report, in fact, stressed the "paramount" importance of eradicating discrimination in federal employment, declaring that "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. No. 238, 92d Cong., 1st Sess. 22-23 (1971). Similarly, a key sponsor emphasized that "[p]reviously, there have been unrealistically high barriers which prevented or discouraged a federal employee from taking a case to court. This will no longer be the case. There is no reason why a federal employee should not have the same private right of action enjoyed by the individual in the private sector . . . ." (Statement of Senator Williams, *reprinted in* SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SUBCOMMITTEE ON LABOR, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 92d Cong., 2d Sess. 1727 (Comm. Print 1972). *See also* Statement of Senator Cranston (section 717(c) "creates a remedy in Federal district court—comparable to private employment actions"). *Id.* at 1723.

Title VII provides the exclusive remedy for claims of discrimination in federal employment. *Brown v. General Services Administration*, 425 U.S. 820, 835 (1976). Given its declared intent to eradicate discrimination by *expanding* federal employees' access to the courts, it is inconceivable that Congress intended the unusually short 30-day time limit in the exclusive new scheme to operate as an absolute jurisdictional requirement.

An inflexible 30-day time limit on exercise of an employee's right to file a suit in district court would erect a formidable obstacle to enforcement of the Act. A "guiding principle" of Title VII is that "technical reading[s]" are " 'particularly inappropriate in a statutory scheme in

which laymen, unassisted by trained lawyers, initiate the process.' " *Zipes*, 455 U.S. at 397, *quoting Love v. Pullman*, 404 U.S. 522, 527 (1972). Such concerns are particularly important in the federal sector because the 30-day time limit is drastically shorter than the 90-day limit for filing suit in the private sector.[11] There is significantly less time for an employee to correct a mistake arising out of any of the accepted bases for equitable tolling such as inadequate notice, or wrong or misleading information from the employing agency. *See Baldwin County*, 466 U.S. at 151.[12]

Even absent these circumstances, 30 days is a difficult deadline for even the most diligent employee to meet. It is no easy task to secure counsel who is familiar with Title VII in general, understands its application in the federal bureaucracy in particular, and is willing to undertake a case despite the uncertainty of obtaining reimbursement for fees under the Statute. Yet, under the inflexible jurisdictional approach taken by the court below, even a pending motion for appointment of counsel would not save an employee's complaint from being dismissed.[13] *See Baldwin County*, 466 U.S. at 151.

---

[11] There is no indication in the legislative history of the Act as to why Congress chose to make the time limit for federal employee suits 30 days.

[12] The provision of misleading information or inadequate notice is certainly not unheard of in the federal bureaucracy. *See, e.g., Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985); *Martinez v. Orr*, 738 F.2d at 1111.

[13] Indeed, under the law that governs in the federal sector, even a complainant who makes a good faith effort to file a complaint in district court on his own within 30 days stands a strong chance of being frustrated in that effort. One peculiarity of section 2000e-16(c) is its absolute requirement that the complaint name "the head of the department, agency, or unit, as appropriate" as defendant. As the Seventh Circuit has observed, "[t]his cryptic phrase provides little guidance to litigants." *Paulk v. Department of the Air Force*, 830 F.2d 79, 80 (7th Cir. 1987). *Accord Mondy v. Secretary of the Army*, 845 F.2d at 1052 n.1.

The byzantine system of rules and regulations governing the EEO complaints procedure in the federal sector provides many traps for the unwary. Victims of discrimination must navigate their way—often unrepresented—through a bewildering array of forums that can include a negotiated grievance-arbitration procedure, the EEOC, the MSPB, the Special Panel and the Court of Appeals for the Federal Circuit, as well as the district courts. As detailed above, *supra* pages 4, 7, the administrative agencies have generally made time limits subject to equitable modification, in recognition of the tortuous path an employee must follow and the many opportunities for missteps along the way. The remedial policies of the Act demand that the same accommodations be made in construing the statutory time limit applicable to the federal complainant who has persevered to the point of judicial filing.

3. The government attempts to use sovereign immunity principles to justify a statutory interpretation that has been rejected in the private sector. Given the statutory structure and policies discussed above, sovereign

---

Rule 15(c) of the Fed. R. Civ. P. allows an amendment correcting the identity of the named defendant to "relate back" to the initial pleading only if the correct party received actual notice of the complaint within the applicable time period. *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986). In a number of reported cases, Title VII complaints brought by federal employees have been dismissed because the employee named the incorrect individual as defendant and was not able to correct the error within the 30-day time period. *E.g., Harris v. U.S. Department of Transportation*, 843 F.2d 219 (5th Cir. 1988) (employee served his employer, the Coast Guard, but failed to name Secretary of Transportation); *Williams v. Army & Air Force Exchange Service*, 830 F.2d 27 (3d Cir. 1987) (employee named AAFES rather than Secretary of Defense); *Bell v. Veterans Administration Hospital*, 826 F.2d 357 (5th Cir. 1987) (employee named Veterans Administration Hospital rather than Administrator, Veterans Affairs).

immunity provides no support for construing the public-sector provision differently from a virtually identical provision in the private-sector law.

While it is a truism that the conditions under which the federal government consents to be sued must be "strictly observed," *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981), recitation of that principle does not advance the analysis here—it merely begs the question. As this Court has observed, waivers of sovereign immunity are not accomplished by a "ritualistic formula." Rather, "intent to waive sovereign immunity, and the scope of that waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board v. United States*, 467 U.S. 512, 521 (1984) (citations omitted). Congress clearly intended a broad waiver of sovereign immunity under Title VII, to make federal rights coextensive with those in the private sector. As demonstrated above, Congress chose language that is permissive in tone and parallels in every respect the non-jurisdictional time limit in section 2000e-5(f)(1).

From the cases construing that private-sector provision, we already know that the most natural reading is to construe the time-limit language as non-jurisdictional. This fact is virtually dispositive. Sovereign immunity does not justify a "strained and unnatural reading" of statutory language. *Chandler v. Roudebush*, 425 U.S. at 848. Rather, "the plain, obvious and rational meaning of a statute is always to be preferred," even where suit is being brought against the government. *Id.* (quotations omitted).

Such an approach is particularly appropriate here because Congress intended to provide federal employees with the same rights as workers in the private sector. One of the themes that "dominated the debates, proposals, and committee reports which preceded the enactment of the Equal Employment Opportunity Act of 1972" was "federal employees' lack of adequate internal safeguards

against employment discrimination and Congress' perception of their lack of access to the courts to raise claims of job discrimination." *Chandler v. Roudebush*, 425 U.S. at 848-49. The Senate Labor Subcommittee "found that an aggrieved Federal employee does not have access to the courts" in large part because "[i]n many cases the employee must overcome a U.S. government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies." S. Rep. No. 92-415 at 16. Congress amended Title VII to cover federal employees in 1972, precisely for the purpose of waiving the government's sovereign immunity so that federal employees would be given the same treatment as those in the private sector. Indeed, it was Congress' intent that the federal government would act as a model and set the example for employers in the private sector. *See* H.R. Rep. No. 92-238 at 24-25.

Congress thus manifestly intended to eliminate the sovereign immunity defense as a barrier to eradication of discrimination in the federal service and to the full exercise by federal employees of the rights enjoyed by private employees. While this Court is not empowered to extend a waiver of sovereign immunity beyond that which the legislature has contemplated, the Court also may not "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. at 118, *citing Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). As this Court has often repeated, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *E.g.*, *United States v. Mitchell*, 463 U.S. 206, 220 (1983); *Block v. Neal*, 460 U.S. 289, 298 (1983); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951); *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949), *quoting*

Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).

As we have shown, the structure, history, and policy underlying the 1972 amendments to Title VII establish that Congress intended the 30-day time limit of section 2000e-16(c) to be subject to the same equitable principles as its private-sector counterpart. Congress, in fact, intended that sovereign immunity would not be interposed as an obstacle to promoting the remedial purposes of the Act and giving federal employees the same rights as other workers. The decision of the lower court frustrates that clear intent and merits reversal.

CONCLUSION

The decision of the court of appeals should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

GREGORY O'DUDEN *
Director of Litigation

ELAINE KAPLAN
Deputy Director of Litigation

KERRY L. ADAMS
Assistant Director of Litigation

NATIONAL TREASURY
EMPLOYEES UNION
1730 K Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 785-4411

* Counsel of Record

April 1990